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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

In re EDWARD RONWIN,

Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF MANDAMUS TO THE SUPREME COURT OF ARIZONA

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QUESTIONS PRESENTED

1) Does the Petition present a case or controversy within the meaning of U.S. CONST. art. III, § 2?
2) If a case or controversy is presented, has Petitioner established a clear and indisputable right to issuance of a writ of mandamus?

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JURISDICTION

Petitioner has no standing to invoke the Court's jurisdiction because he presents no case or controversy within the meaning of U.S. CONST. art. III, § 2. The Court therefore lacks jurisdiction to consider the Petition.

CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 2, Constitution of the United States, provides in relevant part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under

Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT OF THE CASE

Petitioner filed his tenth application for admission to the State Bar of Arizona on June 6, 1983, which application was designated No. SB 52-10. Respondent denied Petitioner's ninth application for admission on July 6, 1983 in In re Ronwin, ____ Ariz. ____, 667 P.2d 1281, cert. denied sub nom. Ronwin v. Supreme Court of Arizona, 52 U.S.L.W. 3370 (U.S. Nov. 7, 1983).

On July 25, 1983, while his tenth application was pending, Petitioner filed a document entitled "Request," demanding that he be given a "written statement of all charges and/or reasons that this [Respondent] Court has, or believes itself to have, for refusing to admit RONWIN to the State Bar of Arizona." In his "Request" he also demanded an evidentiary hearing "presided over by an impartial decisionmaker(s)," preceded by discovery, and affording Petitioner and Respondent

the opportunity to call, examine and cross-examine witnesses and to present documentary evidence. [Respondent's App. at 23-24.] The "Request" was filed in Cause No. SB 52-10 and presumably related to Petitioner's tenth application. Without explicitly acting upon the "Request," Respondent denied Petitioner's tenth application for admission to the State Bar of Arizona on September 13, 1983. That decision has not been brought before this Court for review.

SUMMARY OF ARGUMENT

Petitioner fails to present a case or controversy within the meaning of U.S. CONST. art. III, § 2. He has not sought review of Respondent's denial of his tenth application for admission. That determination has become final and binding upon him. Petitioner asks the Court to order that no application by him for admission to the State Bar of Arizona may be denied by Respondent without following prescribed procedures. This is nothing more than a request for an advisory opinion. Since each application must be considered on its own merit and in the context of the facts presented by it, this Court could do no more than state general guidelines to be applied in hypothetical situations. Thus, there is no case or controversy over which the Court has jurisdiction.

Even if the Court has jurisdiction to consider the Petition, its allegations do

not present a viable claim for mandamus relief. The remedy of mandamus has long been recognized as an extraordinary, even drastic, remedy, to be invoked only with the utmost caution. A party seeking issuance of such a writ must show that three criteria are satisfied, i.e., the writ will be in aid of the Court's appellate jurisdiction, exceptional circumstances are present warranting the exercise of the Court's discretionary powers, and adequate relief is otherwise unavailable. The right to issuance of the writ must be clear and indisputable. Measured by these standards, the Petition now before this Court presents a wholly inappropriate case for issuance of the writ.

Congress and this Court have determined that a writ of mandamus will issue only when necessary or appropriate in aid of the Court's appellate jurisdiction. The writ has been used traditionally to

confine an inferior court to a lawful exercise of its prescribed jurisdiction, or to compel an inferior court to exercise its authority when it is its duty to do so. Neither of these circumstances exists here.

Petitioner does not contend that Respondent's actions in denying his application for admission and interpreting its own rules in light of constitutional requirements to determine what procedures were necessary are beyond its jurisdiction. Such a contention would be meritless, because plainly those actions were taken in the course of the exercise of Respondent's jurisdiction to decide issues properly before it. Even if Respondent's decision were erroneous, it would not involve an abuse of judicial power. Further, there is no action required of Respondent which it has not already taken. Therefore, the writ could not be in aid of

this Court's appellate jurisdiction.

Mandamus is also inappropriate because Petitioner has pointed to no exceptional circumstances warranting the exercise of this Court's discretionary powers.

Finally, adequate relief was available to Petitioner had he elected to file a petition for writ of certiorari challenging the denial of his tenth application. His failure to do so constitutes a forfeiture of any opportunity for review by this Court. Mandamus is not a substitute for the normal appellate process.

ARGUMENT

I.

THE COURT HAS NO JURISDICTION OVER THE PETITION BECAUSE IT PRESENTS NO CASE OR CONTROVERSY.

This Court has often declined invitations "to decide hypothetical issues or to give advisory opinions . . . ." E.g., Princeton University v. Schmid, 455 U.S. 100, 102 (1982) (per curiam). The Constitution limits the jurisdiction of this Court to those disputes presenting an actual case or controversy within the meaning of Article III, § 2. The Petition does not satisfy this jurisdictional prerequisite.

Petitioner invokes this Court's aid in the form of a writ of mandamus.[1]

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[1] Petitioner cites 28 U.S.C. § 1651 and Sup. Ct. R. 26 and 27 as bases for this Court's jurisdiction to issue such a writ. He also cites 28 U.S.C. § 1257, although (Footnote 1 continued.)

Although it is unclear whether Petitioner intends the writ to affect consideration of his tenth application for admission, Respondent's denial of that application is no longer open to challenge.[2] The current Petition can relate only to subsequent applications, if any, filed by Petitioner.

Responsibility for the critical

(Footnote 1 continued.)

it is clear from his Petition that he is not seeking review by writ of certiorari. He states that he "does not seek a full review of the Arizona court's action in denying Ronwin's tenth application, but merely asks for an Order to said Court to obey constitutional requirements by offering Ronwin an opportunity for a full evidentiary hearing accompanied with all due process safeguards before said court decides any application for admission made by Ronwin." [Footnote omitted; Petition at 6.]

[2] Respondent's denial of Petitioner's tenth application for admission was subject to this Court's review by writ of certiorari. District of Columbia Court of Appeals v. Feldman, ____ U.S. ____, 103 S. Ct. 1303, 1314 n.15 (1983); 28 U.S.C. § 1257. Having failed to request such review, Petitioner is not now free to challenge denial of that application.

function[3] of supervising the conduct of lawyers on behalf of the State of Arizona, including ultimate responsibility for admitting candidates to the practice of law, is vested in Respondent. In re Anonymous Member of the State Bar of Arizona, 128 Ariz. 238, 239, 624 P.2d 1286, 1287 (1981); In re Ronwin, ____ Ariz. ____, 667 P.2d 1281, 1283, cert. denied sub nom. Ronwin v. Supreme Court of Arizona, 52 U.S.L.W. 3370 (U.S. Nov. 7, 1983). Respondent has declared that each application for admission to the Bar must be judged on its own merit. In re Ronwin,

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[3] This Court has recognized that "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975). See also District of Columbia Court of Appeals v. Feldman, ___ U.S. ___, 103 S. Ct. 1303, 1315-16 n.16 (1983); Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423, 434-35 (1982).

supra, 667 P.2d at 1284. Petitioner ignores this fact, seeking instead a blanket pronouncement prescribing procedural safeguards that Respondent must employ in considering future applications, regardless of the circumstances presented by those applications. By definition this would be an advisory opinion. This Court has no jurisdiction to entertain a Petition making such a request.

II.

MANDAMUS RELIEF IS INAPPROPRIATE IN THIS ACTION, BECAUSE PETITIONER HAS FAILED TO ESTABLISH A CLEAR AND INDISPUTABLE RIGHT TO SUCH RELIEF.

Petitioner must show that three criteria are met in order to justify the exercise of this Court's discretion in issuing a writ of mandamus: 1) the writ will be in aid of the Court's appellate jurisdiction; 2) exceptional circumstances are present warranting the exercise of the

Court's discretionary powers; and 3) adequate relief cannot be had in any other form or from any other court. Sup. Ct. R. 26. He must also demonstrate that his right to issuance of the writ is "clear and indisputable." Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980) (per curiam); Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 384 (1953). Petitioner has not shown that any of these criteria is satisfied.

A. The writ would not be in aid of the Court's appellate jurisdiction.

From its earliest days this Court has declared consistently that the writ of mandamus will issue only in the exercise or in aid of the exercise of the Court's appellate jurisdiction. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175 (1803); Chandler v. Judicial Council, 398 U.S. 74, 86 (1970); 28 U.S.C. § 1651(a); Sup. Ct. R. 26. The writ has been used

traditionally to confine an inferior court to a lawful exercise of its prescribed jurisdiction, or to compel an inferior court to exercise its authority when it is its duty to do so. Kerr v. United States District Court, 426 U.S. 394, 402 (1976).

Petitioner does not allege that Respondent acted beyond its jurisdiction in denying his tenth application for admission to the State Bar, or in interpreting its own rules in light of constitutional requirements to determine what procedures were necessary. Indeed, those functions are undoubtedly within Respondent's jurisdiction.

The question must be, then, whether the writ sought here is necessary to compel Respondent to exercise its authority when it has a duty to do so. Plainly this is not such a case. Respondent has ruled on

. . .

. . .

Petitioner's applications for admission.[4]

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[4] Petitioner complains that Respondent's rules and decisions "require that bar applicants be accorded an opportunity for hearing with due process safeguards before final determination of their applications for admission to practice law." [Petition at 4.] Yet Respondent has held that, given the circumstances requiring denial of Petitioner's ninth application, no evidentiary hearing was necessary. In re Ronwin, ____ Ariz. ____, 667 P.2d 1281, 1289-90, cert. denied sub nom. Ronwin v. Supreme Court of Arizona, 52 U.S.L.W. 3370 (U.S. Nov. 7, 1983). To the extent that that holding turns upon interpretation of Arizona court decisions and rules, it is conclusive. See Gurley v. Rhoden, 421 U.S. 200, 208 (1975); Moore v. Illinois Central Railroad Co., 312 U.S. 630, 633-34 (1941). Petitioner does not suggest that the circumstances compelling rejection of his ninth application ceased to exist before Respondent ruled on his tenth application.

Further, this Court has long held that a writ of mandamus cannot be used to direct a subordinate court to rule in a particular fashion. E.g., Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 382-83 (1953); Ex parte Perry, 102 U.S. 183, 186 (1880); Ex parte Newman, 81 U.S. (14 Wall.) 152, 169-70 (1871); Ex parte Secombe, 60 U.S. (19 How.) 9, 15 (1856). Therefore, mandamus is unavailable to Petitioner as a tool to compel Respondent to adopt his view of the procedure

(Footnote 4 continued.)

Since Respondent has performed the function required of it by its jurisdiction, mandamus is unnecessary in aid of this Court's appellate jurisdiction.

B. No exceptional circumstances exist that warrant the exercise of this Court's discretionary powers.

Petitioner has pointed to no circumstance that would justify invocation of this Court's discretionary powers in his aid. The Court has previously ruled that inconvenience and hardship caused by delay in resolution of a dispute are insufficient to warrant use of the mandamus remedy. Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 383-84 (1953). Even if Petitioner's arguments were correct, he could establish no

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(Footnote 4 continued.)

required in considering his application for admission to the State Bar.

circumstances more compelling than these.

C. Adequate relief was available through normal appellate review had Petitioner chosen to request it.

This Court declared more than a century ago:

> The general principle which governs proceedings by mandamus is, that whatever can be done without the employment of that extraordinary remedy, may not be done with it. [Emphasis in original.]

Ex parte Rowland, 104 U.S. 604, 617 (1881). The policy against piecemeal appellate review and the problems caused by making members of the judiciary litigants, as well as the Court's traditional reluctance to use this extraordinary writ, have ensured the continuing vitality of this principle. E.g., Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 35-36 (1980) (per curiam); Helstoski v. Meanor, 442 U.S. 500, 506 (1979); Kerr v. United States District Court, 426 U.S. 394, 402-03

(1976); Chandler v. Judicial Council, 398 U.S. 74, 86 (1970).

In District of Columbia Court of Appeals v. Feldman, ___ U.S. ___, 103 S. Ct. 1303, 1315 (1983), the Court noted that it alone could review a state court's final judgment in a bar admission matter. The fact that Petitioner elected not to file a petition for writ of certiorari from denial of his tenth application does not mean that no other form of relief was available. It simply means that he forfeited any opportunity he had for review by this Court. That election does not make this case appropriate for mandamus. See In re Green, 141 U.S. 325, 326-27 (1891). If Petitioner files an application in the future, and if that application is denied, that denial would also be subject to this Court's review by writ of certiorari. The writ of mandamus is not a substitute for the normal

appellate process.

D. The decisions of this Court relied on by Petitioner do not support issuance of a writ of mandamus in this case.

Petitioner relies on four decisions of this Court to support the relief he seeks. All are inapposite.[5] In Schware v. Board of Examiners of New Mexico, 353 U.S. 232 (1957), the Court reversed the decision of the New Mexico Supreme Court, which had upheld the Board's decision not to permit Schware to take the bar examination. The Court held that the record contained no evidence that rationally justified a finding that Schware was morally unfit to practice law, and therefore the denial of an opportunity to take the examination deprived Schware of due process. Id. at 246-47. Unlike the review sought in Schware, Petitioner in the present

[5]It is worthy of note, however, that all four cases came to this Court by writ of certiorari, not writ of mandamus.

action does not ask this Court to review Respondent's denial of his tenth application on the merits. Schware is simply irrelevant to the matters raised in the Petition.

The decision in Greene v. McElroy, 360 U.S. 474 (1959), addressed the issue of whether the Department of Defense was authorized to establish a program which could deny security clearances on the basis of confidential information, and in doing so bypass traditional rights of confrontation and cross-examination. Id. at 493. The Court found that neither the President nor Congress had given such authority to the Department of Defense. It declined to consider whether such a program, if authorized, would have conformed to the Constitution. Id. at 508. Thus, the Court never reached the issue which Petitioner attempts to raise here.

The Court in Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963), reviewed an order of the Court of Appeals of New York, affirming denial of an application for admission to the practice of law. In that case the applicant had never been advised of the bases for the conclusion that he had failed to demonstrate his good character. Denial of admission to the Bar, in view of the lack of notice or opportunity to contest the reasons for this conclusion, constituted denial of due process. Id. at 106.

The procedure condemned in Willner bears no relation to that accorded Petitioner. Respondent described in In re Ronwin, ___ Ariz. ___, 667 P.2d 1281, 1284 (1983), the procedure followed in ruling on Petitioner's ninth application. That procedure included notice of the scope of Respondent's review of the facts from designated sources, an opportunity for

Petitioner to file a memorandum addressing both the procedure and the issues raised by the record to be considered, and an opportunity to submit by affidavit or offer of proof any factual matter which he wished Respondent to consider. In denying his ninth application, Respondent explained in great detail the grounds for its decision, and concluded by stating:

> Applicant will be permitted to reapply when and if he can establish that he is able to control his conduct in such a manner that the bar and bench will have some assurance that his behavior will conform to that which is expected of lawyers in our system of justice.

667 P.2d at 1291.

Petitioner cannot claim in good faith that he had no notice of the deficiencies found by Respondent. Further, Petitioner made no effort, in connection with his tenth application, to demonstrate greater control of his conduct.

Finally, the recent decision in

District of Columbia Court of Appeals v. Feldman, ___ U.S. ___, 103 S. Ct. 1303 (1983), also does not support the Petition. There the Court held that the United States District Court had no jurisdiction to review refusals to waive the requirement that an applicant graduate from a law school approved by the American Bar Association before becoming a member of the District of Columbia Bar. Id. at 1315. However, the District Court did have jurisdiction to consider a general challenge to the constitutionality of the District of Columbia Court of Appeals rule imposing that requirement. Id. at 1315-16. Feldman simply does not lend support to Petitioner's allegation that Respondent has erred, nor does it endorse an attempt to use the mandamus procedure under the circumstances of this case.

CONCLUSION

For the reasons set forth above, the Petition should be denied.

RESPECTFULLY SUBMITTED this 30th day of December, 1983.

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APPENDIX

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IN THE SUPREME COURT

OF THE STATE OF ARIZONA

In the Matter of	)	Cause No. SB 52-10
	)	
EDWARD RONWIN	)	REQUEST
	)	

RONWIN hereby requests:

1. A written statement of all charges and/or reasons that this Court has, or believes itself to have, for refusing to admit RONWIN to the State Bar of Arizona.

2. An evidentiary hearing on any such charges and/or reasons, including:

(a) an adequate pre-hearing discovery time and the availability of subpoena process to command the presence of witnesses at depositions.

(b) an evidentiary hearing at a convenient time and place.

(c) the hearing to respect and

allow:

(i) the right of RONWIN to call any witnesses he may choose and the right of RONWIN to examine any such witnesses; the Court and/or its agents to have the same right.

(ii) the right of RONWIN and of the Court and/or its agents to cross-examine any witness.

(iii) the right to present documentary evidence and of RONWIN and of the Court and/or its agents to inspect and/or to cross-examine upon any evidence.

(iv) the hearing to be presided over by an impartial decisionmaker(s).

These elements are required under due process. RONWIN has previously cited and quoted on numerous occasions to this Court, decisions of the United States Supreme Court which make such a hearing mandatory. Those decisions include: Schware v. Board of Bar Examiners of State

of N.M., 353 U.S. 232, 238-239, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957); Greene v. McElroy, 360 U.S. 474, 492, 496-497, 79 S.Ct. 1400, 1411, 1413-1414 (1959); Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 1017, 1020-1022 (1970). Additionally, the case of Willner v. Committee on Character and Fitness, 373 U.S. 106, 83 S.Ct. 1175 (1963) specifically forbids the determination of (contested) applications for Bar admission without an adequate notice from "Government" of what it proposes and without a "full" hearing which the U.S. Supreme Court defines as a "fair and open" hearing. The Willner decision specifically eschews the notion that merely allowing the submission of "evidence" meets the requirements of due process under the Fourteenth Amendment. Thus, the Court in Willner exclaimed, 373 U.S. at 103-104, 83 S.Ct. at 1180:

> We have emphasized in recent years that procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood. See Greene v. McElroy . . and cases cited. That view has been taken by several state courts when it comes to procedural due process and the admission to practice law . . (citing, inter alia, Application of Burke, 87 Ariz. 336, 351 P.2d 169) . . . We think the need for confrontation is a necessary conclusion from the requirements of procedural due process in a situation such as this (i.e., a Bar application) . . . (last parenthetical comment added).

Continuing, Willner, 373 U.S. at 105, 83 S.Ct. at 1181:

> But a 'full hearing' -- a fair and open hearing -- requires more than that. * * * Those who are brought into contest with * * * Government in a quasi-judicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.' Morgan v. United States, 304 U.S. 1, 18-19, 58 S.ct. [sic] 773, 776, 82 L.Ed. 1129. Petitioner has no opportunity to ascertain and contest the bases of the Committee's reports to the Appellate Division, and the Appellate Division gave him no separate hearing. Yet, '[t]he

> requirements of fairness are not exhausted in taking or consideration of evidence, but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps' . .

Those "steps" obviously include the "confrontational" aspects of due process; that is, a full (fair and open) hearing.

WHEREFORE, RONWIN requests:

1. a written statement of the charges and/or reasons for this Courts refusal to admit RONWIN on this (SB 52-10) application to the State Bar of Arizona; and,

2. an evidentiary, full hearing--one which affords all the requirements of due process as declared by the U.S. Supreme Court.

/s/ Edward Ronwin
Edward Ronwin, Applicant pro se

CERTIFICATE OF SERVICE

Three copies of the foregoing Brief in Opposition to Petition for a Writ of Mandamus to the Supreme Court of Arizona and accompanying Appendix were served by certified mail, return receipt requested, postage prepaid, on December 30, 1983, on:

Edward Ronwin
P. O. Box 3585
Urbandale, Iowa 50322.

Mr. Ronwin is the only party on whom service of this Brief in Opposition is required.

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